IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1467

ARNOLD H. MIDTAUNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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March 19, 1979

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APPENDIX

CITATIONS

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ARNOLD H. MIDTAUNE,

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Petitioner, Arnold H. Midtaune, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 2, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 589 F.2d 370, and a copy appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 2, 1979. A timely petition for rehearing *en banc* was denied on January 24, 1979. On February 9, 1979, Mr. Justice Blackmun signed an Order extending the time for the filing of this petition to and including March 23, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1) and Rule 22 (2) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

Whether a search warrant can be issued to federal law enforcement authorities based upon an underlying affidavit which (1) fails to make the necessary averments of time, and (2) does not meet the requirements laid down by this Court in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

STATEMENT OF THE CASE

On March 10, 1978, the jurisdiction of the District Court was invoked by the United States Attorney for the District of Minnesota when a federal grand jury handed down a thirteen-count indictment charging the Petitioner with a violation of 18 U.S.C. §1341, to-wit: devising a scheme or artifice to defraud the Hennepin County Department of Welfare by use of the United States mails.

The Petitioner was convicted on six of the thirteen counts on May 15, 1978, and was subsequently sentenced by the Honorable Harry H. MacLaughlin, United States District Judge, to three years in prison and a $1000 fine on each count, the sentences to run concurrently. (Orders of July 10 and July 17, 1978.)

The Petitioner owns and operates several apartment buildings in Minneapolis, and on September 1, 1977, his rental offices were searched by United States Postal authorities pursuant to a search warrant granted by a United States magistrate. The items seized formed the basis for the grand jury indictment, and several of those items were subsequently introduced at trial.

In the affidavit underlying the application for the search warrant, United States Postal Inspector R. M. Haggard stated as follows:

> "R. M. Haggard, being first duly sworn, deposes and states that I am a Postal Inspector with the United States Postal Service, and in that capacity have been assigned to investigate fraudulent claims for welfare benefits whereby claimants have made fraudulent claims for General Assistance Benefits from the Hennepin County Welfare Department, Minneapolis, Minnesota.
>
> Your affiant has been advised by a reliable informant who has proven on numerous occasions to be reliable in the past that the owner of apartment buildings or residences located at the addresses of 22 Oak Grove, 26 Oak Grove, 218 Oak Grove, 1901 Colfax Avenue South, 1802 Colfax Avenue South, 300 East 15th Street, 17 East 24th Street, and 3533 Second Avenue South, all located in Minneapolis, Minnesota, was fraudulently completing landlord statements for welfare claimants, which statements reflected that the claimant was residing or would be residing at the address shown on the statement. The reliable informant advised your affiant that in many instances the welfare claimant was not residing and never did reside at the address shown on the landlord statement but

that the claimant and the owner completing the statement had an agreement that any welfare checks received for rent payment as a result of the fraudulent welfare claim would be divided between the claimant and the owner of the building.

Your affiant has received information from James Bergin, Investigator, Welfare Legal Services, Hennepin County Attorney's Office, Minneapolis, Minnesota, that Hennepin County Welfare records reflect that the above-listed addresses are owned and managed by the firm of Midtaune Brothers, Inc., with Arnold and Lowell Midtaune being the known owners of Midtaune Bros., Inc. Mr. Bergin advised your affiant that he has reviewed a number of welfare claims which reflect that Welfare General Assistance Benefits have been paid to claimants based on landlord statements signed by Arnold Midtaune with the subsequent payment checks being vendored directly to Midtaune Bros., Inc., and that the checks were sent by mail through the United States Postal Service. Mr. Bergin advised your affiant that he has visited the apartment building at 26 Oak Grove on several occasions in the past and has observed and reviewed business records relating to the rental of apartments to welfare beneficiaries. Mr. Bergin stated those business records were maintained in a room on the first floor, which room is designated by a sign on the door that shows the word 'office.'

Daniel Dodge, Deputy U.S. Marshal, Minneapolis, Minnesota, advised your affiant that a confidential informant who has provided reliable information to him in the past received welfare benefits based on the fact she made a fraudulent claim for welfare benefits which reflected she

resided at a certain address where he knew she did not reside. Your affiant has reviewed records of the Hennepin County Welfare Department which reflect that payments were made by that Department based on a claim that this informant was residing at an apartment located at 22 Oak Grove, Minneapolis, Minnesota, during the period of August, 1976, through January, 1977.

Raymond Cyrt, Special Investigator, U.S. Postal Inspection Service, Minneapolis, Minnesota, advised your affiant that incident to investigation of stolen and forged checks he has visited the office of Midtaune Bros., Inc., located at 26 Oak Grove, Minneapolis, Minnesota, on several occasions and has observed business records at that location relating to rental of apartments at buildings owned by Midtaune. Investigator Cyrt stated that on August 22, 1977, he visited the office at 26 Oak Grove, Minneapolis, Minnesota, and business records of the various offices were being maintained at that location. On that date he obtained from office personnel at 26 Oak Grove a copy of a rental agreement and a check addressed to an individual relating to an apartment located at 218 Oak Grove.

R. M. HAGGARD
Postal Inspector
United States Postal Service"

The procedural history of the Petitioner's challenge to the search warrant in this case is as follows:

On April 6, 1978, the Petitioner filed a motion to suppress evidence challenging, among other things, the lack of essential averments of time in the underlying affidavit. (Motion to Suppress, dated April 6, 1978.)

The United States Magistrate filed his Report and Recommendation on April 13, 1978, rejecting the Petitioner's argument that the information in the affidavit was stale. (Report and Recommendation, dated April 13, 1978.)

On April 24, 1978, the Petitioner requested a *de novo* determination regarding the Motion to Suppress (Motion dated April 24, 1978), which motion was denied on May 8, 1978, without opinion, by Judge MacLaughlin, the trial judge. (Order of May 8, 1978.)

During the course of the trial held May 9 through May 15, 1978, the government introduced into evidence forty-eight of the items seized at the time of the September 1, 1977, search. (See Index to Transcript, pages ii-v.)

On May 22, 1978, the Petitioner made post-trial motions to set aside the verdict, etc., on grounds that the evidence seized and subsequently introduced was the product of an illegal search. (Motion, dated May 22, 1978.) The motions were denied on June 14, 1978. (Order of June 14, 1978.)

On July 20, 1978, the Petitioner filed a Notice of Appeal to the Eighth Circuit Court of Appeals. Oral argument was heard on November 13, 1978, and on January 2, 1979, the conviction below was affirmed. 589 F.2d 370 (8th Cir. 1979). A timely petition for rehearing *en banc* was denied on January 24, 1979, (See Appendix 2), and this petition followed.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of The Supreme Court And Of Other Courts Of Appeals Which Set Forth The Requirement That An Averment Of Time Of Observation Be Stated In Search Warrant Affidavits.

The general rule for the central issue presented in this petition may be stated as follows:

> "An affidavit which omits altogether to state the time of the occurrence of the facts relied upon has been held insufficient to show probable cause for the issuance of a search warrant." (See Annotation at 100 ALR2d 525, 527, citing cases.)

This issue has not been considered in depth by the Supreme Court since its holding in *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). In the intervening forty-seven years the Courts of Appeals have left the original premise of Mr. Chief Justice Hughes intact. In that decision, he established the rule that "It is manifest that the proof must be of facts so closely related to the time of the issuance of the warrant to justify a finding of probable cause at that time." 287 U.S. at 210.

A debate over constitutional questions involving search warrants can often be resolved by applying the "common sense" ruling in *United States v. Ventresca*, 380 U.S. 102 (1965). When dealing with questions of staleness, however, *Ventresca* loses some of its force. In the frequently cited case of *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966), the First Circuit said:

"These difficulties lead us to inquire whether the common sense policy articulated in *Ventresca* should be construed to relax the long standing, judicially recognized requirement for averments of time of observation of the underlying facts in an affidavit for a search warrant. In that case, this question was farthest from the minds of the Court since there were no fewer than eleven specific allegations of time. The Court was rather dealing with our concern over the problem of distinguishing among affiant's observation, hearsay, and hearsay on hearsay. We doubt that it would wish to weight the scales in favor of the warrant to the extent of abandoning the requirement of some reasonably specific allegation to give a magistrate a basis for deciding whether a crime was still being committed. In no cases relying on *Ventresca* which have come to our attention has such a major defect been waived. 356 F.2d at 318.

"Common sense" interpretations of affidavits thus do have limitations, and the staleness issue is such a limitation. Deficiencies as to time averments cannot be ignored or rendered moot by applying the well-reasoned holding in *Ventresca*. The courts must look elsewhere when making determinations as to the timeliness of search warrant affidavits.

In *United States v. Harris*, 403 U.S. 573 (1971), the Court rejected a staleness argument where the information giving rise to probable cause was two weeks old at the time of the warrant application. Nevertheless, the decision set in motion a second factor in making determinations of timeliness. Implicit in *Harris* is the view that where a "continuing offense" is alleged the court may validate a warrant which would otherwise fail under *Sgro* and its progeny.

The lower courts have attempted to reconcile the basic tenets of *Sgro* with this newer doctrine; however, it is not possible to discern any specific guidelines in *Harris* since the staleness issue is given only a cursory examination in a footnote. 403 U.S. 573, 579, n.*.

A review of decisions in other Courts of Appeals compels the view that until the Supreme Court establishes standards in this area, the circuits will continue to decide cases alleging staleness *in vacuo*.

When the staleness issue is examined by the courts, the first determination which has to be made is whether the offense was an isolated one or one of a continuous nature. If the facts show an isolated offense, the courts are inclined to hold that the probability of finding evidence of such activity decreases drastically in only a few days. (See *United States v. Johnson*, 461 F.2d 285, 287 [10th Cir. 1972].)

Attention then turns to the time lapse between the most recent observation and the issuance of the warrant. *Schoeneman v. United States*, 317 F.2d 173, 177 (D.C. Cir. 1963). Thus, a two day lapse was found reasonable in *United States v. Ramirez*, 279 F.2d 712 (2nd Cir. 1960), cert. den. 364 U.S. 850, 81 S.Ct. 95, 5 L.Ed. 2d 74, and nineteen days did not vitiate the warrant in *Nuckols v. United States*, 99 F.2d 353 (D.C. App. 1938).

Because of *Harris* it is no longer possible for the courts to determine the timeliness of search warrant applications by merely counting days on a calendar and making a subjective determination of reasonableness or unreasonableness on the facts presented. For if the alleged offense is claimed to be of a continuing nature the court must first satisfy itself that it is, indeed, continuing and that it is reasonable to conclude that the items sought to be seized are presently located where the

affiant says they are.* In making this determination the court has to test the adequacy of the observations. Even where the observations might be sufficient to satisfy the requirements of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), they might not be adequate to establish a presumptio. of continuity. *Durham v. United States*, 454 F.2d 29 (5th Cir. 1972), cert. den. 407 U.S. 911 (1973) makes it very clear that these are two separate tests.

The present case offers a classic example of the dilemma confronting judicial officers in search warrant cases. To put the question in its simplest terms, how far can *Ventresca* and *Harris* be extended to cover doubtful situations without violating constitutional mandates which both Courts would have left inviolate? It is in this unsettled climate that the present petition is presented.

At the earliest stage in the proceedings below the reviewing magistrate considered and rejected the Petitioner's argument that the warrant was defective by reason of staleness. That ruling was adopted *sub silentio* by the District Court and by the Court of Appeals, and as a result, a conflict in principle has arisen whereby the Eighth Circuit has upheld a search warrant which is clearly defective under *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932) and under numerous Courts of Appeals decisions which have dealt with this issue. (See especially *Rosencranz v. United States*, 356 F.2d 310 [1st Cir. 1966], and *United States v. Solario*, 577 F.2d [9th Cir. 1978].)

* For a comprehensive examination of state and federal cases involving the distinction between isolated and continuing offenses, see "A Fresh Look at Stale Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment." 59 Iowa L.Rev. 1308 (1974).

In examining the underlying affidavit, one sees that the crucial allegations are made by Informant No. 1 who states that the owner of certain apartment buildings "was fraudulently completing landlord statements for welfare claimants" and that this owner "had an agreement" with the claimants involved to divide the proceeds between them, supra. The information is all in the past tense. The time when the observation was made is not given, and there is not even an indication of when the tip was made. It should also be noted that this informant made no allegation that a federal offense had been committed, nor did he name the Petitioner.

Passing over such glaring defects, the Court of Appeals held that the information from Informant No. 1 was corroborated "by all other information contained in the affidavit." 589 F.2d 370 at 373. The issue is not yet whether the *Aguilar-Spinelli* requirements have been met. It is still whether or not the observation is adequate to establish a continuing offense, and unless the time element for the informant's tip is established elsewhere in the affidavit the warrant falls.

The only other place to look for the missing averment of time is in the paragraph which discloses information from a Deputy U.S. Marshal who alleges that a "confidential informant" once made a fraudulent claim for welfare benefits. Again, the affidavit speaks in the past tense with no indication at all as to when this alleged offense took place. The affiant did not even disclose the date or time when he received the information from the deputy marshal. Hence, there are still no clues to unlock the mystery of when all of these offenses were supposed to have taken place.

The affiant, however, goes on in that paragraph to assert that he reviewed welfare records which reflected that this second unnamed individual had received welfare payments based

on a claim that she was residing at an apartment located at 22 Oak Grove in Minneapolis "during the period of August, 1976, through January, 1977," 589 F.2d 370, 372, n.2. Testing the adequacy of that observation must start with the conclusion first reached by the reviewing magistrate who said:

> "The second sentence does not clearly establish the claim based upon the informant's residence at 22 Oak Grove was fraudulent (sic) or that the owners of the apartment were aware of or participated in the proceeds resulting from the claim."

Report and Recommendation, dated April 13, 1978, p.2.

Therefore, even if the claim had been of more recent origin it would still not have been adequate to establish a continuing offense. It can be fairly stated that the affidavit is suspended in time past, containing only conclusory statements by Informant No. 1 and the disjunctive proposition in logic that the petitioner was somehow implicated by Informant No. 2.

Other parts of the affidavit contain totally innocuous data. The information from James Bergin, an investigator for the County Attorney's Office, discloses that welfare benefits "have been paid to claimants based on landlord statements signed by Arnold Midtaune . . . and that the checks were sent by mail through the United States Postal Service." Both the information and the giving of the information have no point of reference in time—and no allegations of wrong doing.

Finally, the last paragraph in the affidavit contains information from a Special Investigator for the United States Postal Inspection Service who stated that on August 22, 1977, he observed business records at 26 Oak Grove in Minneapolis, one of the buildings owned by the Petitioner. No criminal nexus is suggested, and again, the affiant failed to disclose when he obtained this information.

In order to make as strong a case as possible for the affidavit one would have to conclude, as did the Court of Appeals (589 F.2d 370, 373, n.3.), that the deputy marshal's informant made a statement against penal interest and that she conspired with the Petitioner to defraud the Hennepin County Welfare Department. Since shelter verification forms (landlord statements) need be completed only once when the premises are originally let, and since none of the other allegations are adequate to establish a continuing offense, the warrant therefore seeks evidence of an isolated offense. But, having made such a case, nothing is gained, since the thirteen month lapse from the date of the alleged offense to the warrant application destroys the affidavit's present reliability. The information is stale. (See *Sgro v. United States*, supra, *United States v. Harris*, supra, *Rosencranz v. United States*, supra, *Schoeneman v. United States*, supra, *Poldo v. United States*, 55 F.2d 866 (9th Cir. 1932), *Dandrea v. United States*, 7 F.2d 861 [8th Cir. 1925], *Kohler v. United States*, 9 F.2d 23 [9th Cir. 1925], and *Staker v. United States*, 5 F.2d 312 [6th Cir. 1925].)

When the petitioner first raised the staleness issue in his original motion to suppress, the reviewing magistrate rejected the argument and made the following observation:

> "Defendant Midtaune also argues that the information contained in the warrant was stale since Informant No. 2's information related to the period of mid-1976 to the end of January, 1977. *The information of Informant No. 1 does not specify any time span.* The records sought are business records which would be prepared and kept in the ordinary course of business of Midtaune Bros., Inc. The magistrate could reasonably conclude that the records would be maintained at the office there for a substantial period of time. In view of the tax laws (sic), a lapse of

eight months is not unreasonable. *Andresen v. Maryland*, 427 U.S. 463, 478, n.9 (1975) [three month lapse]; *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975) [three months lapse]." (Emphasis supplied.)

Report and Recommendation, dated April 13, 1978, pp. 3 and 4.

Assuming even for a moment that a continuing offense was adequately alleged in the affidavit, the court's reliance on *Andresen* and *Steeves* makes the petitioner's contention that there are no adequate standards to guide the courts' thinking in such matters all the more compelling.

Andresen involved a complex real estate scheme where there was a three-month delay between the completion of the transactions on which the warrants were based, and the ensuing searches. The Court held that the three-month delay was not unreasonable because (1) the records sought were prepared in the ordinary course of petitioner's business, and (2) the investigators knew that the petitioner had secured a release on Lot 13T only three weeks before the searches and that another lien remained to be released. 427 U.S. at 479, n.9. In other words, the offense was still continuing right up to the execution of the warrants. Mr. Justice Blackmun, writing for the Court, further noted that the Court had rarely seen warrant-supporting affidavits "so complete and so thorough." 427 U.S. at 478. n.9.

In *Steeves*, the Eighth Circuit upheld a lapse of eighty-seven days from the date of the offense to the application for a warrant. But there, an agent of the Federal Bureau of Investigation stated in the affidavit that the property sought to be seized were proceeds of a robbery "which took place on June 22, 1974." 525 F.2d at 36. The date of the offense was stated, thus satisfying the requirement that the affidavit contain an averment of time of the observations of criminal activity.

While *Andresen* and *Steeves* may be cited as a further extension of the continuing offense doctrine, they cannot be used to prop up an affidavit patently devoid of any essential averments of time.

A conflict in principle among the Court of Appeals should also be noted in light of the three-month lapse approved in *Steeves*. In *United States v. Neal*, 500 F.2d 305 (10th Cir. 1974), the Tenth Circuit invalidated a search warrant where there was a three-month delay from the date of the offense to the warrant application. In so holding, the court said, "We can find no case which has held that a valid search warrant could issue under these circumstances." 500 F.2d 305, 309.

In *Durham v. United States*, 403 F.2d 190 (9th Cir. 1968), the Ninth Circuit found an affidavit fatally defective because more than four months had lapsed before the warrant issued. The court further noted that the principle laid down in *Sgro*, supra, "has been applied in an unbroken line of cases." 403 F.2d 190, 194.

The only case found in which a lapse of more than three months has been approved is *United States v. Guinn*, 454 F.2d 29 (5th Cir. 1972), cert. denied, 407 U.S. 911 (1973). Despite the fact that all the information in the affidavit was at least seven months old, the court held that the permanent location of the property created a convincing presumption of continuity. The property seized in the search was the permanently affixed identification number of the mobile home in which a gambling operation was allegedly housed. 454 F.2d at 36. *Guinn*, therefore, adds another factor for determining continuity: permanent location of the item sought to be seized.

In the present case, the government was seeking evidence

of mail fraud, a fact which prompted the court to construe the search as one for business records. But the mere fact that business records are sought does not make the crime one of a continuous nature. The magistrate, it appears, found fatal defects in the information attributed to both of the informants. As to Informant No. 1, he said the information "did not specify any time span;" and as to Informant No. 2, he found that the information did not establish the claim of fraud, supra. Yet, he found both allegations sufficient to establish a continuing offense.

As evidenced by the magistrate's ruling on the question of staleness, the petitioner raised this issue at the earliest stage in the proceedings. It was again argued to the court and became the central issue on oral argument to the Court of Appeals.* In upholding the warrant in this case, the court perhaps inadvertently overruled every Supreme Court and Court of Appeals decision holding that an affidavit for a search warrant which fails to state the time of the observations of criminal activity is fatally defective.

United States v. Midtaune, therefore, may now be cited for the proposition that averments of time are unnecessary in search warrant affidavits if the court can find probable cause under *Aguilar* and *Spinelli*, supra.

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* See excerpt from the petitioner's motion for rehearing *en banc* attached as Appendix 3.

2. The Decision Below Conflicts With The Decisions Of The Supreme Court And Of Other Courts Of Appeals Which Require A Showing Of Probable Cause Under The Standards Set Forth In *Aguilar v. Texas*, 378 U.S. 108 (1964) And *Spinelli v. United States*, 393 U.S. 410 (1969).

In addition to the challenge that the affidavit failed to make the essential averments of time, the petitioner also contended that it failed to pass the threshold test laid down in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

At the very outset of the criminal proceedings in the District Court the reviewing magistrate acknowledged that the information from Informant No. 1 did not meet the first prong test of *Aguilar* in that the affiant did not set forth any of the underlying circumstances showing how the informant came about his information. (Report and Recommendation, dated April 13, 1978, p.3.) He found, however, that this information was corroborated elsewhere in the affidavit, a view subsequently adopted by the Court of Appeals. 589 F.2d at 373.

Departing from established guidelines, the court below allowed corroboration of totally innocent-seeming activity to prop up the undated allegations of Informant No. 1 — allegations which were already defective under *Aguilar*. In so doing, the Eighth Circuit also collided with another landmark decision, for in *Whiteley v. Warden*, 401 U.S. 560 (1971), Mr. Justice Harlan stated that the additional information "must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony." 401 U.S. at 567. Such corroboration is simply not present in the *Midtaune* affidavit.

Again, Informant No. 1 alleged that the petitioner was making out fraudulent landlord statements for welfare claimants and was keeping part of the proceeds. The fact that there were no underlying circumstances to support that claim has already been conceded by the court. The Court of Appeals, therefore, applied the alternative test of corroboration and found it in the information supplied by the Deputy U.S. Marshal. 589 F.2d 370, 373. His information was incorrectly attributed by the court below to his informant and was found to be a statement against penal interest. *Id.*, n.3. That issue aside, there is nothing in the allegation to tie the fraudulent claim of the informant to the petitioner. Where, one must ask, is there any corroboration of the allegation that the defendant was fraudulently completing landlord statements?

The Court of Appeals cited its previous holding in *United States v. Marihart*, 472 F.2d 809 (8th Cir. 1972), as authority for a finding of probable cause in this case. In *Marihart*, it is noted, the court was persuaded to let the affidavit stand in view of the fact that the trial judge personally recognized the informer as a person who had previously supplied reliable information "upon which the judge had acted and which proved correct." *Id.*, at 811. It is further noted that the Eighth Circuit laid down the precept in *Marihart* that "A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which — even when partially corroborated — is not as reliable as one which passed Aguilar's requirements when standing alone." *Id.*, at 813.

Finally, the court's decision in the present case conflicts with yet another holding of the Supreme Court. In *Warden v. Hayden*, 387 U.S. 294 (1966), it was held that there must be a showing of criminal nexus in the underlying affidavit when the items sought to be seized constitute "mere evidence." Just

as there is no corroboration of Informant No. 1's information, so there is no showing of any criminal nexus with respect to the books and records of Midtaune Bros., Inc. The Petitioner further submits that certain averments of time of observation are essential to establish criminal nexus. It would seem elementary that the time frame of the offense goes to the heart of search warrant inquiries involving mere evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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March 19, 1979

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1562

UNITED STATES OF AMERICA,

Appellee,

vs.

ARNOLD H. MIDTAUNE,

Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: November 13, 1978
Filed: January 2, 1979

Before STEPHENSON, HENLEY and McMILLIAN, Circuit Judges.

STEPHENSON, Circuit Judge.

Defendant Arnold Midtaune appeals from a jury conviction on six counts of an indictment charging use of the mails in carrying out a scheme to defraud the Hennepin County Welfare Department and others of funds through the use of false claims for rent from welfare recipients (18 U.S.C. § 1341).[1]

[1] The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota, imposed fines totaling $6,000 and three years imprisonment on each of the six counts, all to run concurrently.

The principal issue on this appeal is whether a competent affidavit supported the government's application for a search warrant. We affirm.

Defendant Arnold Midtaune, d/b/a Midtaune Bros., owned and managed numerous apartment houses in Minneapolis, Minnesota. During the period involved Midtaune leased apartments to individuals who received rent supplements from the Hennepin County Welfare Department. Qualified individuals can receive rent supplements by showing that they live in Hennepin County. Proof of residence is made by producing a landlord form or shelter verification form signed by the landlord of that residence. The form shows that the claimant is living at a particular address, the amount of rent, what is included by way of utilities, the apartment number, and the name of the landlord. The information is verified by contacting the landlord. With the consent of the claimant, rent supplement checks are sent to the landlord.

The indictment charged and the evidence established that defendant Arnold Midtaune devised a scheme to defraud whereby rent supplement checks were mailed to Midtaune offices upon false representations that the claimants were living in apartments owned and operated by Midtaune when in fact the claimants lived elsewhere. The proceeds of the checks were split between defendant and the claimants for the rent supplements on an approximate one-third and two-thirds basis. The six counts upon which defendant was convicted involved the mailing of rent checks to Midtaune and their ultimate receipt by defendant. Sufficiency of the evidence to warrant conviction is not raised, so further reference to the evidence will be limited to the issues raised on appeal.

Defendant initially urges that the trial court erred in admitting evidence that was seized pursuant to a search warrant

which was not supported by a competent affidavit. A search of the Midtaune Bros. office at 26 Oak Grove, Minneapolis, was conducted, and various books and records were seized. Some of these records were introduced in evidence by the government. The search warrant was issued by a United States Magistrate upon the affidavit for search warrant executed by Postal Inspector R. M. Haggard.[2]

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[2] The inspector's affidavit is in part as follows:

Your affiant has been advised by a reliable informant who has proven on numerous occasions to be reliable in the past that the owner of apartment buildings or residences located at the addresses of 22 Oak Grove, 26 Oak Grove, 218 Oak Grove, 1901 Colfax Avenue South, 1802 Colfax Avenue South, 300 East 15th Street, 17 East 24th Street, and 3533 Second Avenue South, all located in Minneapolis, Minnesota, was fraudulently completing landlord statements for welfare claimants, which statements reflected that the claimant was residing or would be residing at the address shown on the statement. The reliable informant advised your affiant that in many instances the welfare claimant was not residing and never did reside at the address shown on the landlord statement but that the claimant and the owner completing the statement had an agreement that any welfare checks received for rent payment as a result of the fraudulent welfare claim would be divided between the claimant and the owner of the building.

Your affiant has received information from James Bergin, Investigator, Welfare Legal Services, Hennepin County Attorney's Office, Minneapolis, Minnesota, that Hennepin County Welfare records reflect that the above-listed addresses are owned and managed by the firm of Midtaune Brothers, Inc., with Arnold and Lowell Midtaune being the known owners of Midtaune Bros., Inc. Mr. Bergin advised your affiant that he has reviewed a number of welfare claims which reflect that Welfare General Assistance Benefits have been paid to claimants based on landlord statements signed by Arnold Midtaune with the subsequent payment checks being vendored directly to Midtaune Bros., Inc., and that the checks were sent by mail through the United States Postal Service. Mr. Bergin advised your affiant that he has visited the apartment building at 26 Oak Grove on several occasions in the past and has observed and reviewed business records relating to the rental of apartments to welfare beneficiaries. Mr. Bergin stated those business records were maintained in a room on the first floor, which room is designated by a sign on the door that shows the word "office."

Daniel Dodge, Deputy U.S. Marshal, Minneapolis, Minnesota, advised your affiant that a confidential informant who has provided reliable information to him in the past received welfare benefits based on the fact she made a fraudulent claim for welfare

In reviewing the sufficiency of the affidavit, we first note that the search warrant was issued by a United States Magistrate upon a finding of probable cause. "Courts have evinced a strong preference for searches based upon a warrant and have recognized that a search under a warrant might be sustained in some instances where a warrantless search supported only by a police officer's own assessment of probable cause might fail." *United States v. Christenson*, 549 F.2d 53, 55 (8th Cir. 1977); *see United States v. Brown*, 584 F.2d 252 (8th Cir. 1978).

It is also well established that affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion.

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specific-

benefits which reflected she resided at a certain address where he knew she did not reside. Your affiant has reviewed records of the Hennepin County Welfare Department which reflect that payments were made by that Department based on a claim that this informant was residing at an apartment located at 22 Oak Grove, Minneapolis, Minnesota, during the period of August, 1976, through January, 1977.

Raymond Cyrt, Special Investigator, U.S. Postal Inspection Service, Minneapolis, Minnesota, advised your affiant that incident to investigation of stolen and forged checks he has visited the office of Midtaune Bros., Inc., located at 26 Oak Grove, Minneapolis, Minnesota, on several occasions and has observed business records at that location relating to rental of apartments at buildings owned by Midtaune. Investigator Cyrt stated that on August 22, 1977, he visited the office at 26 Oak Grove, Minneapolis, Minnesota, and business records of the various offices were being maintained at that location. On that date he obtained from office personnel at 26 Oak Grove a copy of a rental agreement and a check addressed to an individual relating to an apartment located at 218 Oak Grove.

> ity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

United States v. Ventresca, 380 U.S. 102, 108 (1965).

A finding of probable cause may be based on hearsay supplied by unnamed informants. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Jones v. United States*, 362 U.S. 257, 269 (1960); *Draper v. United States*, 358 U.S. 307, 311-13 (1959). In *Aguilar* the Supreme Court laid down a two-pronged test: The affidavit for search warrant must disclose (1) the circumstances from which the magistrate can conclude the informant was credible and (2) the circumstances supporting the conclusion of defendant's connection with the criminal activity. Appellant concedes in his brief that the first prong as to credibility of the informants was met in the present affidavit. *See United States v. Graham*, 548 F.2d 1302, 1307 (8th Cir. 1977).

In *Spinelli v. United States*, 393 U.S. 410, 416 (1969), the Supreme Court stated:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The question is whether the tip of the unnamed informant (Informant No. 1), that the owner of designated apartment buildings was fraudulently completing landlord statements for welfare claimants and dividing the proceeds, was sufficiently

detailed and corroborated to indicate its probable reliability. *United States v. Marihart*, 472 F.2d 809, 813 (8th Cir. 1972) (en banc); *see United States v. Cummings*, 507 F.2d 324 (8th Cir. 1974). The informant's statement is corroborated by all other information contained in the affidavit. James Bergin corroborates that buildings at all the named addresses furnished by Informant No. 1 are owned by the same entity, Midtaune Bros., which is owned by Arnold Midtaune and Lowell Midtaune, and that county welfare records indicate benefits have been paid to claimants on landlord statements signed by Arnold Midtaune with subsequent rent checks sent through the mail to Midtaune Bros.

The deputy marshal's informant (Informant No. 2) corroborates information furnished by Informant No. 1. Informant No. 2 indicates that she has received welfare payments on a fraudulent claim which reflected she resided at an address where she did not reside.[3] Affiant states that welfare records disclose that rent payments were made based on a claim that Informant No. 2 was residing at 22 Oak Grove during the period August 1976 through January 1977. 22 Oak Grove is one of the addresses listed by Informant No. 1.

Without further discussion it can readily be seen that the affidavit[4] for search warrant was sufficiently detailed and that the unnamed informants' statements were sufficiently corroborated to indicate probable cause for issuance of the search warrant.

Although not raised below, appellant on appeal alleges that the last paragraph of the affidavit in support of the search

[3] The statement being against penal interest has added credibility. *United States v. Graham, supra*, 548 F.2d at 1308.
[4] *See* n.2 *supra*.

warrant indicates that Special Investigator Raymond Cyrt conducted a warrantless search and seizure of records on August 22, 1977. Appellant further alleges that the statements contained in the affidavit attributable to Cyrt recklessly convey the impression that defendant Midtaune was under investigation for forgery and theft. These allegations are frivolous. A fair reading of the paragraph merely indicates that Cyrt had visited the offices at 26 Oak Grove incident to the investigation of stolen and forged checks and had observed business records at that location relating to rental of apartments owned by Midtaune. On August 22, 1977, he obtained from office personnel a copy of a rental agreement and a check addressed to an individual relating to an apartment at 218 Oak Grove. There is nothing to indicate that Cyrt's investigation in any way involved defendant in criminal activity connected with stolen and forged checks. Obviously the Cyrt information is included as corroborative of the information furnished by Bergin as to the business location of Midtaune and the location of its books and records at 26 Oak Grove.

Finally, appellant urges that the court erred in denying his motion to dismiss on the ground that the indictment was too vague and ambiguous, thereby making it impossible for him to discern the nature of the offense with which he was charged. Appellant's contention is devoid of merit and requires little discussion. An indictment must set forth in factual terms the essential elements of the charge. It must sufficiently apprise the defendant of what he must be prepared to meet, and its generality must not endanger his constitutional guarantee against double jeopardy. *United States v. Brown*, 540 F.2d 364, 371 (8th Cir. 1976).

The essential elements of mail fraud under 18 U.S.C. § 1341 are (1) a scheme to defraud, (2) the use of the mails for the

purpose of executing the scheme, and (3) intent to defraud. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Prionas*, 438 F.2d 1049, 1052 (8th Cir.), *cert denied*, 402 U.S. 977 (1971). Count I fully describes the scheme to defraud, and in the last paragraph it sets out the mailing in furtherance of the scheme, including the date. Subsequent counts incorporate all of Count I except the last paragraph and insert in lieu thereof a separate mailing. Defendant was adequately apprised of what he had to be prepared to meet and is fully protected under the double jeopardy clause.

Affirmed.

A true copy.

Attest:
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX 2

(Caption)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 24, 1979

APPENDIX 3

(Caption)

PETITION FOR REHEARING

To the United States Court of Appeals for the Eighth Circuit and the Judges thereof:

Appellant in the above-entitled cause, presents this, his Petition for a Rehearing of the above-entitled cause, and in support thereof respectfully shows:

I

A. That the Court overlooked or misapprehended the major issue raised by the Defendant on appeal, that being the absence of an averment of time of the alleged offense in the affidavit underlying the application for a search warrant.

* * *

II

In support of the foregoing, the Petitioner respectfully makes the following arguments in support of his Petition:

A. The Court overlooked or misapprehended the major issue raised by the Defendant on appeal.

When presenting its case on oral argument, the Defendant stated that this case could be resolved down to a narrow, but very significant issue under the Fourth Amendment and that is the element of time in the underlying affidavit.

The affidavit was examined in this light before the Court and it was pointed out that there was virtually no indication from the affidavit of the time span the informants were talking about in terms of the acts alleged. When the Court is dealing with mere evidence as it is in this case, then time becomes vitally important if there is to be a showing of any criminal nexus as required by *Warden v. Hayden*, 387 U.S. 294 (1966) where the Court said:

"The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus — automatically provided in the case of fruits, instrumentalities or contraband — between the item to be seized and criminal behavior."

Id. at page 307.

It is again pointed out that Informant No. 1 has made an allegation that the owner of certain apartment buildings was fraudulently completing landlord statements for welfare claimants and that he had an agreement with the claimants to split the proceeds. But, the informant does not say when any of this illegal activity was suppose to have happened.

The leading case on this point is *Sgro v. United States*, 287 U.S. 206 (1932) where Mr. Chief Justice Hughes wrote: "It is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify its finding of probable cause at that time." *Id.* at page 210. It is not often that law enforcement officials neglect this essential standard. In fact, in *Rosencranz v. United States*, 356 F.2d 310 (1966) the First Circuit noted that the reason there are not more cases involving affidavits without an averment of time of observation may be taken as evidence of the wide acceptance by public officers and Magistrates of this requirement. In the present case, however, this requirement was totally ignored. For that reason, the *Ventresca* decision, 380 U.S. 102 (1965) itself has to be distinguished. In that case, the question of time was farthest from the minds of the Court since there were no fewer than eleven specific allegations of time in the *Ventresca* affidavit. By contrast, when you read the Midtaune affidavit, you have to ask the question WHEN no fewer than 21

times. It is respectfully submitted, therefore, that if the integrity of the *Ventresca* decision is to be upheld, the affidavit in the present case must be struck down.

* * *

It is the Appellant's firm belief that the present decision of this Court marks a drastic departure from the time-honored holdings in the Federal Courts and in the United States Supreme Court relating to the requirement that an averment of time in an underlying affidavit is one of the most essential factors to be considered in making probable cause judgments under the Fourth Amendment. Accordingly, the Appellant respectfully requests that this question be reviewed by this Honorable Court.